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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

SCOTT McLAUGHLIN, LIBERTARIAN PARTY OF NORTH CAROLINA, THE LIBERTARIAN PARTY, and KATHLEEN FERRELL,

Petitioners,

–v–

NORTH CAROLINA BOARD OF ELECTIONS and WILLIAM A. MARSH, Jr.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether, in a state where major political parties are given substantial financial and other direct benefits in addition to automatic ballot access without imposing any burden on them not shared by minor political parties, election laws which limit major party status to those polling ten percent (10%) of the vote for their candidate for governor or president, five times the degree of support required for initial ballot access, violates the First and Fourteenth Amendment rights of small parties?

II. Whether, in a state where the existence of voters registered as affiliated with a political party provides state funded benefits to the party, election laws which terminate the right of a minor party to maintain and record new voter affiliations on registration rolls during periods when it has temporarily lost its official recognition as ballot qualified and is striving to regain ballot access by petition are constitutional, as held by the Fourth Circuit in this case, or are an invidious discrimination in favor of the two major parties in violation of the First and Fourteenth Amendment rights of small parties, as held by the Tenth Circuit?

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NORTH CAROLINA BOARD OF ELECTIONS and WILLIAM A. MARSH, Jr.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners, Scott McLaughlin, Libertarian Party of North Carolina, The Libertarian Party and Kathleen Ferrell, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on 27 September 1995. The Fourth Circuit denied Petitioner's timely filed petition for reconsideration on 24 October 1995.

CITATIONS TO OPINIONS BELOW

The opinions below are reported. McLaughlin v. North Carolina Board of Elections, 65 F.3d 1215 (4th Cir. 1995); McLaughlin v. North Carolina Board of Elections, 850 F. Supp. 373 (M.D.N.C. 1994).

JURISDICTION

The opinion of the Fourth Circuit was issued on 27 September 1995. Petitioners timely filed petition for rehearing was denied on 24 October 1995. Petitioners sought declaratory and injunctive relief claiming that various election laws violated rights guaranteed by the First and Fourteenth Amendments to the United States Constitution. The district court had subject matter jurisdiction, 28 U.S.C §§ 1331, 1343 and 2201. The Fourth Circuit had jurisdiction over the appeal from final judgment, 28 U.S.C. § 1291. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides in relevant part:

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Fourteenth Amendment to the Constitution of the United States provides in relevant part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of

> citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The provisions of the North Carolina statutes involved are set out in the appendix to this petition.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY.

On 22 February 1993, Petitioners filed a complaint in the United States District Court seeking a declaration that certain provisions of the North Carolina elections laws in N.C.G.S. §§ 163–96, 163–97 and 163–97.1 deprived them of rights guaranteed by the First and Fourteenth Amendment and injunctive relief from their enforcement. The action was brought against the North Carolina State Board of Elections [BOE] and its acting director by The Libertarian Party [national Party], the Libertarian Party of North Carolina [state Party], Scott McLaughlin, a member of the state Party executive committee and its 1992 candidate for governor, and Kathleen Ferrell, a voter who seeking to retain her registered affiliation with the Libertarian Party.

Based on stipulated facts, the parties' motions for summary judgment were referred to Magistrate Judge Eliason. On 25 February 1994, he issued findings and an opinion, recommending that the part of N.C.G.S. § 163–96(b) requiring notarization of the signatures of voters on party ballot access

petitions and a 5¢ per signature verification fee be declared unconstitutional and that Petitioners' other claims be dismissed. On 19 April 1994, District Court Judge Richard C. Erwin issued an order adopting the findings and recommendations of the magistrate and entered final judgement granting Petitioners declaratory and injunctive relief from enforcement of the limited portions of N.C.G.S. § 163–96(b) recommended by the magistrate and dismissing Petitioners' other claims.

Petitioners filed notice of appeal on 19 May 1994. The Fourth Circuit issued a decision affirming the district court on 27 September 1995. On 24 October 1995, the Fourth Circuit denied the petition for reconsideration.

II. STATEMENT OF THE FACTS.

This action was filed following the general election of 3 November 1992. Prior to the election, the Libertarian Party took the steps required by N.C.G.S. § 163–96 to be certified as a "new" political party (for the fourth time), filing petitions signed by registered voters equal to more than 2% of the total vote for Governor in the preceding election. As a result, its candidates for federal, state and local offices appeared on the ballot. Based on the failure of its candidates for Governor and President to poll more than 10% of the votes cast, the North Carolina election laws terminate the Party's status as a party who may nominate candidates for subsequent ballots and have voters register their affiliation with it and forces voters

registered Libertarian to change their registration to "unaffiliated" or, at their option, as affiliated with one of the two major political parties. N.C.G.S. §§ 163–97, 163–97.1. The district court and the Fourth Circuit held the challenged provisions of the election laws to be constitutional, dismissing Petitioners' claims that they violate their rights under the First and Fourteenth Amendments.

A. Political Party Status Under the North Carolina Election Laws.

1. Administrative Control of Elections and Ballot Structure.

North Carolina holds an election for federal, state and county offices in November in even numbered years. At each, voters elect members of Congress, the state legislature, and county officers. At every other election, voters elect officials serving four year terms, including President and Governor.[1] A primary election is held in May to select the candidate from each political party whose name will appear on the general election ballot for each office. N.C. Const. Article II, §§ 1, 2 4, 8 & 9 and Article III, §§ 2 & 7; N.C.G.S. § 163–1.

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[1] The Governor is chosen in the same election year cycle as the President. Elections where voters elect the President and Governor will be referred to as gubernatorial elections and the others as off–year elections. North Carolina holds municipal elections in odd numbered years. Thus, there are four general elections, two state and two municipal, in each four year gubernatorial election cycle.

North Carolina has enacted a complex set of election laws regulating voter qualification and registration and the selection and eligibility of candidates. The responsibility to enforce and decide disputes arising out of them laws is placed in the BOE, a five member agency appointed by the Governor. N.C.G.S. §§ 163–19 through –22.1. Under control of the BOE, responsibility to apply and enforce them in each county is placed in three member county boards of elections. County boards appoint three local election officials in each voting precinct, a registrar and two judges of elections, to supervise and control voting in the precinct.[2]

Voters register in the precinct of their residence. Records recording name, address, age, sex, race, date of registration and party affiliation are maintained and constantly updated by the county boards. A voter who moves to another county must register in that county and cancel prior registrations. Voters are purged based on cancellation notices, by quarterly lists of those deceased and those convicted of

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[2] The election laws are designed to ensure that the BOE and county boards are controlled by the two major parties, with a one member majority for the Governor's party. The statutes permit only thee members of the BOE, two members of a county board and two of a precinct's officials to belong to the same party, and require all be appointed from lists submitted by chairmen of the two parties having the highest number of registered voters statewide. N.C.G.S. §§ 163–19, –30, –41 and –47.

felony, and by removal of those failing to vote in two successive gubernatorial elections. Voters must report, and the county boards must change records, upon a change of name or address. Party affiliation is changed at the request of a voter. N.C.G.S §§ 163–54 to –55 and 163–65 to –74.

The ballot is structured to give prominent mention of a candidate's affiliation with a "ballot qualified" party.[3] Ballots are printed in parallel columns, with the name of the party at the top and of its nominees for office below. Immediately below the party name is a place to mark a single "straight ticket" vote for that party's nominees for every office. Columns are assigned in alphabetical order for parties with at least 5% of the statewide voter registration. A party with less than 5% registration is assigned a column at the right. Individuals qualifying by petition for a particular office are listed in a separate column under the title "Unaffiliated Candidates." N.C.G.S §§ 163–140(b) and 163–140.1.

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[3] The election laws use two definitions of "party." The term "ballot qualified" party in this petition refers to the definition under the laws qualifying a party to appear on ballots and have voters register as affiliated with it. Ballot qualified status was lost by the Libertarians under the statutes challenged in this action. A broader definition of "party" applies to N.C.G.S. Chapter 163, Article 22A, regulating political contributions. It continues to cover the Libertarian Party despite its loss of ballot qualified status.

2. Political Party Ballot Access.

North Carolina has two categories of ballot qualified parties. To qualify as "new," a party must file with the BOE petitions signed by registered voters equal to at least 2% of the total votes cast in the last election for Governor and certificates of the chairmen of county boards of elections attesting that the signatures were compared to voter registration records and the number found to be qualified and registered to vote.[4] N.C.G.S. §§ 163–96(a)(2) and (b). When the requirement is met, the BOE certifies that the party qualifies as a "new" political party whose nominees will appear on the general election ballot.[5] At the first general election following qualification, the "new" party nominates its candidates by state party convention and cannot nominate by

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[4] The number of voter signatures necessary for a "new" party petition was set at 10,000 in 1937, reduced to 5,000 in 1981 and raised in 1983 to its present level of 2% of the number voting at the last general election for governor.

[5] The term "new" political party is used to refer to a party which became ballot qualified by petition under N.C.G.S. § 163–96(a)(2). "New" is a misnomer. Parties like the Libertarians, which have a twenty year continuous existence and were ballot qualified in the past, are required to repeatedly seek ballot qualified status by petition as a "new" party after their ballot qualified status is terminated by statute.

primary election. N.C.G.S. § 163–98.[6] Certification as a "new" party allows voters to register as affiliated with it.

The other category of ballot qualified party is one whose nominee for President or Governor received at least 10% of the total vote cast for that office at the last election. N.C.G.S. § 163–96(a)(1).[7] The ballot qualified status of a party is terminated when its nominees for those two offices fail to poll at least 10% of the statewide vote.

> When any political party fails to poll for its candidate for governor, or for presidential electors, at least ten percent (10%) of the entire vote cast in the State for governor or for presidential electors at a general election, it shall cease to be a political party within the meaning of the primary and general elections laws and all other provisions of this Chapter.

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[6] No provision permits a small party, not qualified for statewide ballot access, to nominate candidates for local offices by showing support in a local area. N.C.G.S. §§ 163–122 & –140(b) (candidates qualifying for a local office by petition of registered voters in the local district must be listed on the ballot in the column for "Unaffiliated Candidates").

[7] Polling more than 10% of the vote for any other office does not serve to protect the party's status as ballot qualified even for that office. Indeed, under the laws, a candidate of a "new" ballot qualified party elected at an election where the party's candidates for governor and president got less than 10% would have to run for reelection as "unaffiliated."

N.C.G.S § 163–97.[8] Termination of ballot qualified status mandates the change of the registration of those affiliated with the terminated party to "unaffiliated."

> The State Board of Elections shall be authorized to promulgate appropriate procedures to order the county boards of elections to change the registration affiliation of all voters who are recorded on the voter registration books as being affiliated with a political party which has lost its legal status as provided in G.S. 163–97. . . . All voters affiliated with such expired party shall be changed to "unaffiliated" designation by the State Board's order and all such registrations shall be entitled to declare a political party affiliation as provided in G.S. 163–74(b).

N.C.G.S. § 163–97.1[9]

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[8] This is one of the statutes challenged in this action. Only the Democratic and Republican Parties have ever achieved this status. The term major party is used in this petition to refer to such parties and the process by which they continue their ballot qualified status for another four year election cycle will be referred to as retention. As shown below, retention provides a constellation of benefits with no offsetting liabilities. It is the provision of benefits with no liabilities exclusively to the two major parties which is the basis for Petitioners' claim that the 10% vote provision operates as an invidious discrimination against small parties.

[9] This is one of the statutes challenged by Petitioners in this action. The BOE has temporarily held off enacting the mandated administrative regulation to disaffiliate Libertarians while this action is pending.

Ballot qualified major parties and "new" parties remaining ballot qualified for a second general election following their certification chose nominees for offices by primary election.[10] The State and counties pay all of the costs of conducting primary elections. N.C.G.S. § 163–105. The laws impose no requirements for county or local party structure or meetings. A voter may vote only in the primary of the party with whom he is affiliated in his voter registration. Those registered "unaffiliated" may vote in the primary of a party whose internal rules permit voting by such voters. N.C.G.S. § 163–59 and 163–74(a1).

3. Other Benefits to Ballot Qualified Political Parties.

In addition to ballot access and the right to register affiliated voters, ballot qualified status provides other benefits.

County boards of elections update the lists of registered voters by adding newly registered voters, purging those no longer qualified to vote and recording changes in address, voting precinct, name and party affiliation. Ballot qualified

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[10] Because termination of ballot qualified status comes from a failure to poll 10% of the vote at a gubernatorial election, "new" party status is limited to a four year cycle. If a "new" party is certified prior to an off–year election, it must select nominees for the off–year election by convention and nominees for the gubernatorial election by primary. The conclusion of the courts below primaries are limited to major parties, who met the 10% vote requirement, is incorrect.

parties are entitled to a free copy of the printed list every two years from each county board. In the 94 (of 100) counties which maintain registration lists on computer, ballot qualified parties are entitled to a free copy of the current printed list and to a computer disc containing name, address, sex, race, age, party affiliation and precinct of every registered voter once each odd-numbered year and twice each even-numbered year. N.C.G.S § 163-66.

Public tax funds are put in the North Carolina Political Parties Financing Fund. Each taxpayer has the option to have $1.00 of his income tax segregated from general revenues and credited to the fund. Money deposited in the fund is allocated quarterly among political parties on a pro rata basis based on the number of voters registered as affiliated with that party. Parties entitled to a pro rata allocation of the fund are those qualified for ballot access, those whose candidate for Governor or President received at least 10% of the total vote cast for that office at the last general election and those who qualified as "new" parties under the § 163-96 petition process by July 1 of the prior year. N.C.G.S. § 105-159.1.[11]

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[11] Money allocated to a party, paid by the BOE to its state chairman, may be used to support the party and its candidates at a general election but not for expenses associated with a primary election. N.C.G.S. §§ 163-278.41 through -278.45 (Article 22B of Chapter 163).

4. Obligations on all Political Parties.

Losing ballot qualified status under N.C.G.S. § 163–96 and –97 doesn't free a party of regulation. Extensive regulation and reporting requirements apply to contributions and expenditures for political purposes by any "political committee." N.C.G.S. §§ 163–278.6 through –278.36 (Article 22A of Chapter 163). By definition every political party is a political committee and "political party" expressly includes those not ballot qualified under § 163–96. A political purpose is defined to include any purpose in aid of any political party. N.C.G.S. §§ 163–278.6(14), (15) and (16).

Article 22A requires a party to report the name and address of its treasurer to the BOE. He must maintain current records of all contributions, loans and expenditures and must file a statement of organization (name, address and purpose of the party; name, address and relationship of every affiliated party; and name and number of all bank accounts) and detailed financial reports of contributions, loans and expenditures prior to each primary, prior to each general election and annually. N.C.G.S. §§ 163–278.7(a), –278.7(b), –278.8(a), –278.9. A party may not receive corporate contributions, may not receive anonymous contributions above $100.00 and may not receive contributions in excess of $100.00 unless made by check or money order. N.C.G.S. §§ 163–278.14 and 278.15. Failure to comply with the provisions of Article 22A subjects

the party and its treasurer to criminal penalty. N.C.G.S. § 163-278.27.[12]

B. Libertarian Party Status in North Carolina.

The national Libertarian Party regularly holds national conventions, has a national political platform and has successfully supported candidates for public office. The state Party was formed in 1976 and has participated in general elections in North Carolina ever since.

Prior to the 1976 election, the Party qualified as a "new" party by filing the required petitions and nominated a candidate for President. Its candidate failed to poll 10% of the vote. By statute, it was deemed to have ceased to exist for purposes of ballot access and voter registration. Prior to the 1980 election, it qualified as a "new" party by filing the required petitions and nominated a candidate for President. Its candidate failed to poll 10% of the vote. By statute, it was deemed to have ceased to exist for purposes of ballot access and voter registration. Prior to the 1984 election, it qualified as a "new" party by filing the required petitions (raised to 2% of the total votes cast for Governor in the prior general election) and nominated a slate of candidates for

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[12] In compliance with Article 22A defining it as a party, though deemed to have ceased to be a party for ballot access and voter registration purposes, the Libertarian Party is subject to the limitations on contributions and is required to, and continues to, file the required financial reports with the BOE.

office, including President and Governor. Its candidates failed to poll the 10% threshold vote. By statute, it was deemed to have ceased to exist for purposes of ballot access and voter registration.[13]

Prior to the 1992 election, in a process taking a year and costing $42,000, the Party again qualified as "new" by filing petitions containing 43,620 valid signatures and nominated a slate of candidates for federal and state office. It was certified by the BOE in May. By October 5, when the voter registration books closed for the election, 677 voters had registered as affiliated with it. Petitioner McLaughlin was nominated as the candidate for Governor. He polled 104,983 votes, over 4% of the total cast. Libertarian candidates in four state legislative districts polled over 10% of the votes cast for those seats.

Because its candidates for President and Governor polled less than 10% of the total vote, the Party is deemed to "cease to be a political party" for ballot access and voter registration, N.C.G.S. § 163–97, and, once the mandated order is issued by the BOE, the registration of voters affiliated with it will be changed to unaffiliated, N.C.G.S. § 163–97.1. To

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[13] Prior to the 1988 election, the Libertarian Party's candidate for President qualified to have write–in votes for him counted. As always, only the Democratic and Republican Party candidates exceeded the 10% vote threshold that year.

again gain ballot qualified status, the Party must file petitions containing signatures of 51,904 voters, 2% of the votes for Governor in 1992. The 104,903 votes cast for the Libertarian candidate for Governor in 1992, more than twice this number, do not protect it from being deemed to have "cease[d] to be a political party" for ballot access and voter registration purposes. The votes in excess of 10% of the total in four legislative districts do not permit the Libertarians to nominate party candidates even in those districts.

REASONS FOR ALLOWING THE WRIT

I. This Court Should Determine the Important Issue It Has Not Previously Considered of Whether, in a State Where Major Political Parties are Given Substantial Financial and Other Direct Benefits in Addition to Automatic Ballot Access Without Imposing Any Burden on Them Not Shared by Minor Political Parties, Election Laws Which Limit Major Party Status to Those Polling Ten Percent (10%) of the Vote for Their Candidate for Governor or President, Five Times the Degree of Support Required for Initial Ballot Access, Violates the First and Fourteenth Amendment Rights of Small Parties.

Challenges to of election laws affecting the First and Fourteenth Amendment rights of groups of voters are subject to the balancing test first established in Anderson v. Celebrezze, 460 U.S. 780, 789–790 (1983). This case concerns laws imposing severe burdens on ballot access by small parties. Such laws are subject to strict scrutiny, requiring the state show that the burdens imposed on the small party

are the least restrictive means necessary to serve a compelling interest. Burdick v. Takushi, 504 U.S. ___, 119 L.Ed.2d 245, 253 (1992); Norman v. Reed, 502 U.S. ___, 116 L.E.2d 711, 722–723 (1992); Eu v. San Francisco County Democratic Central Committee, 489 U.S. 214, 222 (1989).

This case raises the issue of the constitutional limits on the magnitude of ballot access retention laws giving major parties continuous, automatic access to general election ballots in a system which provides substantial benefits exclusively to the major parties while imposing equal or greater liabilities on minor parties. This Court has decided cases dealing with the existence of ballot access retention laws in systems where major party status imposes liabilities for major parties not shared by minor parties. It has not considered the constitutional limits on the magnitude of the burden for treatment as a major party or systems where major party status imposes substantial benefits and no offsetting liabilities. This case raises important issues of federal constitutional law not previously decided by this Court. The decision of the Fourth Circuit appears to be in conflict with this Court's decisions.

The goal of every group associated in a political party is to elect those representing its views to office. To do so, it must gain access to the ballot. To be effective, it must retain ballot access for succeeding elections. To allow participation by new parties, states must devise a scheme for them to gain

ballot access. The method used by North Carolina is ballot access petition. To prevent the major parties (who control the legislature) from having to petition every election cycle, North Carolina establishes an alternative method for ballot access retention, by polling a percentage of votes for one of two offices, Governor or President.

The number of votes cast for governor at the last election is used as the base for the amount of support required for both initial ballot access and retention. Access by petition requires the signatures of 2% of that number from the group of all registered voters. Retention requires the vote of 10% for a party's candidate for Governor or President, five times the number required for access by petition. Although a few minor parties have gained access by petition, the 10% vote requirement for retention is so high that only the Democratic and Republican Parties have ever reached it. Failure to meet the 10% vote required for retention results in cancellation of not only ballot access, but also the right to affiliate voters on registration rolls and the substantial benefits that the state gives to parties with affiliated voters, including public tax funds for the general election campaign and ballot position.

After polling over 100,000 votes for its candidate for Governor and more than 10% of the vote for candidates in four state legislative districts in 1992, the Libertarians challenged the constitutionality of the 10% vote retention

requirement as an undue burden and an invidious discrimination in favor the two major parties. Recognizing the substantial burden of the 10% ballot access retention provision, particularly in light of the absence of any separate method for party ballot access in local districts by showing support in that district, the Fourth Circuit concluded that it was required to uphold the constitutionality of the 10% retention requirement because of this Court's approval of "two-tier" systems in Jenness v. Fortson, 403 U.S. 431 (1971) and American Party of Texas v. White, 415 U.S. 767 (1974). Recognizing that subsequent opinions of this Court raised some doubt about the constitutionality of the "two-tier" system employed in North Carolina, the Fourth Circuit held "we fell bound to treat the result in White as controlling unless and until the Supreme Court provides a much clearer signal to the contrary."

Under the Georgia system in Jenness, a political organization's candidates could get on the ballot two ways, by winning a primary election conducted by a "party," one whose candidate for Governor or President polled at least 20% of the vote in the last election, or by being endorsed by a "body" and filing petitions signed by voters equal to 5% of those eligible to vote in the district for that office at the last election. Under the Texas system in White, a political party's candidates could get on the ballot three ways, by winning a

primary election conducted by a party whose candidate for Governor polled 200,000 votes in the last election, by being nominated by convention of a party whose candidate for Governor polled 2% of the votes in the last election, or by being nominated by convention of a party that filed petitions signed by voters (and counted heads at precinct conventions on primary day) equal to 1% of the votes for Governor in the last election. In both cases, this Court held the degree of support required for initial ballot access not unduly burdensome. In both cases, this Court rejected claims that the existence of a two-tier system denied equal protection, denying a complaint in Jenness to the provision of automatic ballot access for major parties and a complaint in White to the provision of state funds to major parties to defray the costs of conducting primary elections, by noting that major party status carried substantial burdens not shared by a minor party because major parties had to nominate by primary election and to provide the organizational structure, down to the precinct level, and the out-of-pocket expense of conducting primaries.

In neither case did this Court consider a challenge to the magnitude of the showing required to for ballot access retention. Starting with the equal protection issue, the system in North Carolina is fundamentally different. It provides substantial state funded benefits to major parties without imposing any burdens not shared equally by minor parties.

The North Carolina 10% ballot access retention provision creates two classes of political party during each four year election cycle. The major parties retain automatic ballot access and the right to maintain old and accumulate new voter affiliations on the registration rolls continuously. Minor parties like the Libertarians go through (1) a period of time after each gubernatorial election during which they must conduct a petition drive for "new" party ballot access, they are not ballot qualified, and they lose their right to maintain old and accumulate new voter affiliations, (2) followed by a period after requalifying as "new," during which they are ballot qualified and are permitted to start again accumulating voter registration affiliations from zero.

In North Carolina, a major party must nominate by primary election. A minor party must nominate by convention for the first election following certification as "new" and by primary election in any subsequent election in the four year cycle. Nomination by primary imposes no burden on a major party not shared by a minor party. The state, not the party, bears the full cost of, and obligation to provide the organizational structure required for, primary elections. The election laws impose no requirement for organizational structure on a major party in order to nominate by primary. A minor party must bear the financial and organizational cost of a petition drive. While it is doing so, the major party receives signifi-

cant state tax money from the Political Parties Financing Fund, based on its pro rata share of voter registration affiliations, for later use in the general election campaign. A minor party receives no tax money, because it is ineligible to maintain old or record new voter affiliations.[14] Throughout the four year cycle, a major and minor party bear equally the burden of the laws regulating and requiring reports of contributions and expenditures, laws which continue to treat a minor party as a recognized party after it has "ceased to exist" for ballot access and voter registration purposes.

Like initial ballot access requirements, requiring some percent of vote at a general election for retention does serve a state's legitimate interest in requiring all parties to make a periodic showing of a modicum of support sufficient to protect it from ballots cluttered with frivolous candidates and frivolous parties. Because the equal protection equation was fundamentally different, involving a mix of benefits and burdens to major parties with ballot access retention, Jenness and White do not address the issue of the constitutional limits on the magnitude of ballot access retention laws protecting the two major parties in state's like North Carolina. The analysis

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[14] The ballot access petition drive prior to the 1992 election cost the Libertarians $42,000. After expending those funds, the Libertarians had only $16,000 to spend on the general election campaign of their candidate for Governor.

of this Court in other ballot access cases suggests clearly that the state cannot justify the 10% vote requirement for retention as the least restrictive means for serving that interest.

First, requiring a showing of support at a level of 10% of the relevant electorate is beyond the support level that a state can presumptively justify as constitutionally necessary. See Storer v. Brown, 415 U.S. 724 (1974) (access by petition requires signatures of 5% of vote in last gubernatorial election, remanded for findings if too burdensome because restrictions on those eligible to sign effectively raised the percentage above 5%).[15]

Second, the state has determined that support by 2% of those voting in the last gubernatorial election on ballot access petitions is adequate to protect it from ballot clutter. Since the petition requirement was raised to that level in 1983, only three minor parties (Libertarians in 1984 and 1992, Socialist

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[15] Lower court's read Storer as setting 5% of the relevant electorate as the outer bound of magnitude of support a state can justify as presumptively constitutional. See Lendall v. Jernigan, 424 F. Supp. 951 (E.D. Ark. 1977), aff'd, 433 U.S. 901 (1977) (10% signatures for independent candidate petition unconstitutional); Greaves v. State Board of Elections, 508 F. Supp. 78, 82 (E.D.N.C. 1980) (10% of votes in last gubernatorial election for independent candidate petition unconstitutional); American Party v. Jernigan, 424 F. Supp. 943 (E.D. Ark. 1977) (7% of votes at last election for governor or president for party retention or new party petition unconstitutional).

Workers in 1984, and New Alliance in 1988) have been able to meet the 2% requirement. The Libertarian candidate for governor in 1992 polled more than 4% of the vote, twice that level of support.[16] In light of the history of its effectiveness to serve the state's interest, having chosen 2% of those voting for governor as the level of support necessary to prevent ballots cluttered with "new" parties, the state cannot claim that 10% of the vote is a necessary showing of support to serve it interest and that a 4% vote is not a sufficient showing of support for ballot access retention. See Norman v. Reed, supra; Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173 (1979)

Because this case raises the important issue, not previously considered by this Court, of the constitutionality of the magnitude of ballot access retention requirements, in the context of an equal protection equation where the state's laws provide direct financial benefits to major parties with ballot access retention without imposing any burden not shared equally by minor parties, and because the analysis in this Court's other ballot access cases suggests that the 10%

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[16] Because ballot access petitions may be signed by any voter, including those affiliated with and voting for the candidates of another party, polling 2% at an election where a voter may vote for only one party's candidate is a much stronger showing of support for a minor party and its views than petition signatures.

retention requirement in this case cannot be justified as the least restrictive means for protecting the state's legitimate interests in a periodic showing of support to prevent ballot clutter, Petitioners' ask this Court to grant certiorari to decide their claim.

II. This Court Should Resolve the Conflict Between the Fourth and Tenth Circuits as to the Constitutionality of Election Laws Terminating the Right of A Minor Party to Retain and Record New Voter Affiliations on Registration Roles During Periods When the Party Has Temporariiy Lost Ballot Access Recognition.

When certified as ballot qualified in May 1992, the Libertarian Party also gained the right to have voters register as affiliated with it on registration rolls. When it failed to poll 10% of the vote for governor or president, in addition to losing ballot access, it "lost its legal status" as a party eligible to have new voters affiliate with it, N.C.G.S. § 163–97, and all of its existing voter affiliations must be changed to "unaffiliated," N.C.G.S. § 163–97.1. The two major parties retain existing voter affiliations and continue to be eligible to have more voters register as affiliated with them. Libertarians claim that these provisions burden them in two ways during periods of temporary loss of ballot access status, (1) by preventing them from the benefit of updated voter registration affiliation records maintained at state expense and provided without cost to the two major parties and (2) by denying them

the benefits that accrue from exploiting the build up of voter registration affiliations through inertia, as the major parties can, which give the major parties the derived benefits of tax funds for their general election campaign and position at the front of the ballot.

Applying the Anderson balancing test, the Fourth Circuit (1) rejected the Libertarians' first claim as no burden, reasoning it was sufficient to have old registration lists and to be able to purchase updated lists for a fee; (2) accepted the second Libertarians' claim as a real burden; (3) held the disaffiliation provisions served the state's interest in "administrative simplicity," reasoning that allowing every small party to have voters listed as affiliated with it would produce a sizeable list of parties with a potential for confusion of similar party names; and (4) held that, although the administrative burden that would be imposed on the state was not great, it was sufficient to outweigh the small burden on the Libertarians. The decision of the Fourth Circuit is in direct conflict with the decision of the Tenth Circuit in an identical fact situation, Baer v. Meyer, 728 F.2d 471, 475 (10th Cir. 1984).

In Baer, the Libertarian and the Citizens Party challenged laws which permitted only major parties, those who had polled 10% of the vote for governor in the last election, to register voters as affiliated with them. In conflict with the Fourth Circuit, the Tenth Circuit found the first claimed

burden, lack of access to updated and current information on voter choices to associate with a party, to be both real and significant, finding such information to be a "key to successful political organizing and campaigning" for all parties, including minor parties temporarily without ballot access status. Id. at 475. Old voter registration lists existing prior to the 1992 election do not show the new voters finding merit in the Libertarian message sufficient to cause them to desire to record or change their affiliation to Libertarian, leaving the Party "unable to determine from the welter of 'unaffiliateds" which of those unaffiliated voters are in fact supporters of their political organization." Id.

In conflict with the Fourth Circuit, the Tenth Circuit found the state's claim of a potential for many small parties with similar names clamoring for the right to voter affiliation to be a myth, because the right to voter affiliation could be limited to the few parties who had been previously recognized by placing candidates on the ballot. Id. 475--476. Only three parties have gained the right to ballot qualification in North Carolina since 1983 when the petition requirement was raised to 2% of those voting for governor in the past election. The challenge raised by the Libertarians which terminate their prior right to maintain old and record new voter affiliations would apply to very few parties. In addition, the statute for ballot access petitions expressly protected against similar

party names, requiring the BOE to "reject petitions for the formation of a new party if the name chosen contains any words contained in the name of an existing party." N.C.G.S. § 163–96(b).[17]

The Tenth Circuit held that the actual administrative burden on the state of being required to record voter affiliations of two small parties was nominal in a state where registration lists were computerized. Even without the additional burden on the Libertarians in North Carolina, where the right to maintain old and record new affiliations gives the major parties tax money for their general election campaign, the Tenth Circuit held the nominal administrative burden on the state insufficient to justify the burden of depriving a small party of current information from voter registration lists recording those choosing to affiliate with it. In conflict with the Fourth Circuit, the Tenth held the bar to registration of

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[17] The campaign contribution laws, which continue to govern the Libertarians after termination of their right to affiliate voters, contain a sufficient alternative measure of when a ballot access party has shrunk to insignificance. They require a party's treasurer to report to the BOE when the party is no longer active, when it has no political contributions for a year, or when it does not intend receive or expend more than $1,0000 annually. N.C.G.S. §§ 163–278.10 and 163–278.10A. This fully protects the State's interest in being able to determine when a party has become "frivolous" to the point where there is reason to terminate its ability to register affiliated voters.

affiliation with small, but previously recognized and still active, political parties to be unconstitutional.[18]

The decision of the Tenth Circuit in Baer is consistent with the requirement of Anderson to consider in every election law case, in addition to the weight of the State's interests, the "extent to which those interests make it necessary to burden the plaintiff's rights." 460 U.S. at 789–790. On this issue, this Court should grant certiorari to resolve the conflict between the Fourth and Tenth Circuits.

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[18] In a subsequent case from Oklahoma where registration lists were maintained by hand and not computerized, the Tenth Circuit found the administrative burden on the state to be greater and sufficient to justify the laws barring voter affiliation with parties who had lost their ballot access status by failing to poll 10% of the vote for governor or president. Rainbow Coalition of Oklahoma v. Oklahoma State Election Board, 844 F.2d 741 (10th Cir. 1988). The Tenth Circuit did not change the analysis followed in Baer. The balance was struck differently only because the state's administrative burden is greater when registration lists are maintained manually. Registration lists in North Carolina are computerized like those in Colorado at issue in Baer.

CONCLUSION

For all of the foregoing reasons, Petitioners respectfully request that this Court grant their petition and issue its writ of certiorari to review the judgment of the Fourth Circuit affirming the judgment of the District Court.

This the 22d day of January, 1996,

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